HENG YEOW HUA

v.

TAN YEW LAI & SONS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YEOP SANI J
[CIVIL APPEAL NO. 60 OF 1980]
16 OCTOBER 1981

LAND LAW: *Order of Sessions Court for vacant possession and mesne profits - Whether it amounted to rescission; charge of interest for delayed payments - Whether claim for possession inconsistent with agreement - Whether election applicable; jurisdiction of Sessions Court - Title of property in issue; order of Sessions Court consequent upon an undertaking - Relief not asked for in statement of claim - Whether order binding.*

The respondent (plaintiff) claimed for vacant possession and mesne profits as from the date of the purported termination of the agreement. The respondent was a housing developer and the agreement between the parties was admittedly a sale agreement in respect of a house.

The agreement was entered into in February 1975. Purchase price agreed to was RM39,500. The house was completed in March 1976. The progress payments amounting to RM17,500 were made. The balance of RM22,000 was to be paid by regular instalments for 120 months. In all, 35 instalments were made between the period of May 1976 to 22 September 1978, but not as regularly as agreed on. The last payment was made in July 1978. There was a protracted and heated correspondence between the parties over the disputed interest overdue.

Finally, notice to deliver vacant possession on or before 28 February 1979 was sent to the appellant.

The main issues raised by the appeal were:

(a) Did the order of the learned President amount to a rescission order?

(b) Was respondent duplicating his claim in that having elected to charge interest for late payments according to the agreement and having received and taken interests over the years, can he now ask for an alternative remedy contradictory to his election?

(c) There was no need to consider the third point as the appellant had waived it at the conclusion of the hearing of the appeal.

(d) Did the Sessions Court have jurisdiction to hear the suit as the appellant alleged that an issue of title was involved?

The respondent on his part sought during argument to remove that part of the learned President's orders pertaining to an undertaking given by the respondent to refund the defendant any sum outstanding, on the ground that the relief was never asked for in the statement of claim.

Held:

[1] There was nothing to justify interference as to the findings of facts made by the trial Court.

[2] The order of the learned President was not an order for rescission and cannot be construed as such.

The respondent was merely claiming for vacant possession and mesne profits, a remedy provided by the agreement and the main remedy asked for in the statement of claim.

[3] The principle of election had no application on the facts of the case. Where a plaintiff merely claims alternative reliefs, the general rule is that he can elect at the trial but where relief is asked on footings which are inconsistent, the plaintiff should be put to his election at the trial.

The principle that a person may not "approbate and reprobate" is according to Halsbury's a type of estoppel intermediate between "estoppel by record" and "estoppel in pais". The principle is that a party may not "approbate and reprobate" and this expresses two propositions namely (1) the person having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile and (2) the person will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the choice of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent. Thus a plaintiff having two inconsistent claims who elects to abandon one and pursue the other, may not, in general, afterwards choose to return to the former claim and sue on it, but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them.

[4] The Sessions Court had jurisdiction. The question of ownership of property was not raised in the defence and title to the property was not in issue. It is only when the question of ownership of property is raised in the defence, thereby bringing out the question of title, that the matter is taken out of the jurisdiction of the Subordinate Court (*Ali Mat bin Khamis v. Jamaliah binti Kassim* [1974] 1 MLJ 18). Thomson J (as he then was) stated in *Hiew Kim Swee v. G.C. Gomez* [1955] 21 MLJ 170, 172:

> On the other hand, where proceedings were taken for possession under s. 122 of the 1846 Act (or the later corresponding sections) it was held, again from the very commencement, that where a defence was raised which on the face of it would raise a question of title, it was the duty of the Judge to inquire into the facts upon which such a defence was based. That was decided in 1848 in the case of *In re Fearon v. Nowall* [1848] 17 L.J.O.B.161.

[5] The respondent was bound by his undertaking to refund to the appellant any sum outstanding after judgment had been satisfied. That part of the order of the learned President, consequent upon that undertaking, should not be interfered with. Courts in every cause or matter pending before them should grant all such remedies as appear to be necessary and to which the party would appear entitled in respect of any legal or equitable claim. One of the underlying objectives in rules of procedure, to avoid unnecessary duplication of suits and/or proceedings, is thus achieved, by the controversy between the parties being completely and finally determined. In any case, there was no cross appeal against that part of the order of the learned President.

[The appeal was dismissed with costs and the order of the learned President affirmed.]

Cases referred to:
Hiew Kim Swee v. G.C. Gomez [1955] MLJ 172
Ali Mat bin Khamis v. Jamaliah binti Kassim [1974] 1 MLJ 18

For the applicant - J.G. Bernatt; Baharuddin, Bernatt, Tan & Ker
For the respondent - Jennifer Chong (Miss); Mah Kok & Din

JUDGMENT

Hashim Yeop Sani J:

The plaintiff (respondent now) was claiming for vacant possession and mesne profits as from the date of the purported termination of the agreement (P1). The plaintiff was a housing developer and the agreement between the parties was admittedly a sale agreement in respect of a house and described as such in the agreement itself. The learned President saw it clearly as an agreement for the sale of house No. 297, Taman Dato Tan Yew Lai, Kuala Lumpur. In fact from their pleadings the parties themselves throughout treated the agreement as such and the terms and conditions of sale of the house was as agreed upon by the plaintiff and the defendant.

The agreement was entered into in February 1975. Purchase price agreed to was RM39,500. The house was completed in March 1976 and possession given to appellant presumably also in March 1976. Apparently payments were made for about 2 years but not as regularly as stipulated in the agreement. The last payment was made in July 1978. Since then no payments were made. Notice (P4) was sent to the appellant to deliver vacant possession on or before 28 February 1979.

Clause 4.02 of P1 deals with the mode of progress payments amounting to RM17,500 of the purchase price. It says that each payment would be due upon furnishing the requisite notice and architect's certificate stating that so much of the construction had been completed. The learned President dealt satisfactorily with the issue of the requisite notices and the certificates raised by the defendant. The balance of RM22,000 of the purchase price was to be paid by regular instalments for 120 months. The learned President found that in all 35 instalments had been made for the period 29 May 1976 to 22 September 1978. From the facts of the case the learned President also found that the defendant had acquiesced to the non-compliance of certain requirements of P1.

It would appear from the evidence as well as the grounds of judgment that there was a protracted and heated correspondence between the parties over the disputed interest overdue - see P14, P15 and D20. When finally no payment was made on the sums overdue the letter terminating the agreement was sent to the defendant and giving him notice to quit on or before 28 February 1979.

The memorandum of appeal raises some minor issues of fact but the main questions of law are:

(1) Does the order of the learned President amount to a rescission order?

(2) Is respondent duplicating his claims in that having elected to charge interest for late payments according to the agreement and having received and taken interest over the years can he now ask for an alternative remedy contradictory to his election?

(3) Was there an infringement of any provisions of the National Land Code 1965 and the Moneylenders Ordinance 1951?

(4) Did the Sessions Court have jurisdiction to hear the suit as the appellant alleged that an issue of title was involved?

As regards question (1) it is to be observed that the claim of the respondent (plaintiff before the learned President) was simply for vacant possession and mesne profits. It is a remedy provided by the agreement executed between the parties. Although it does seem odd that the respondent, who admittedly was a housing developer at the material time and the

agreement was executed as a sale agreement, the agreement also purports to be a loan agreement. No objection on the nature of the agreement was however raised on behalf of the appellant at any stage of the proceeding. The relief granted by the President was in any case the main relief asked for in the statement of claim. It is not an order for rescission and cannot be construed as such. In any case at the conclusion of hearing of the appeal Counsel for appellant stated that he was waiving this ground.

As regards question (2) the law on election as to the proper remedy by a plaintiff is settled. The principle that a person may not "approbate and reprobate" is according to *Halsbury's* a type of estoppel intermediate between "estoppel by record" and "estoppel in pais". The principle is that a party may not "approbate and reprobate" and this expresses two propositions namely (1) the person having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile and (2) the person will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the choice of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent. Thus a plaintiff having two inconsistent claims who elects to abandon one and pursue the other may not, in general, afterwards choose to return to the former claim and sue on it, but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them.

Where a plaintiff merely claims alternative reliefs, the general rule is that he can elect at the trial but where relief is asked on footings which are inconsistent (for example damages on the basis of a contract having been repudiated and a declaration on the basis that the contract is subsisting) the plaintiff should be put to his election at the trial. This principle has no application on the facts of this case.

As regards question (3) it is observed that no where was this argument raised during the hearing before the learned President nor was it stated anywhere in the pleadings. The statement of defence merely denies any default (without good cause) by the appellant. What was disputed was the effectiveness of notices P2 etc., on the grounds that the proviso to Clause 4.02 of P1 had not been complied with. This was another ground which Counsel for appellant stated he was waiving at the conclusion of the hearing of the appeal. For these reasons I do not wish to consider this point at all.

The appellant during argument here also raises the question of jurisdiction as it was contended that there was an issue of title. The rule for the Courts to follow on the question where there is *bona fide* issue of title involved is well set out in *Hiew Kim, Swee v. G.C. Gomez* [1955] MLJ 172 where Thomson J (as he then was) said:

> On the other hand, where proceedings were taken for possession under s. 122 of the 1846 Act (or the later corresponding sections) it was held, again from the very commencement, that where a defence was raised which on the face of it would raise a question of title it was the duty of the Judge to inquire into the facts upon which such a defence was based. That was decided in 1848 in the case of *In re Fearon v. Nowall* [1848] 17 LJQB 161.

In *Ali Mat bin Khamis v. Jamaliah binti Kassim* [1974] 1 MLJ 18 the question of ownership of property was raised in the defence thereby bringing out the question of title which took the matter outside the jurisdiction of the Subordinate Court. This is not the case here. A Sessions Court can hear and determine any action or suit for recovery of immovable property so long as the title to the property is not in issue.

Thus my answers to all the four questions raised are against the appellant. As regards questions of fact I find nothing to justify interference as the findings of fact were clearly made by the trial Court.

There appears at the end of the judgment of the learned President that Counsel for the plaintiff "undertook to refund to the defendant any sum outstanding after judgment had been satisfied." The respondent sought during argument to remove that part of the learned President's order on the grounds simply that the relief was never asked for in the statement of claim.

One of the underlying objectives in rules of procedure is to avoid unnecessary duplication of suits and/or proceedings. Therefore Courts in every cause or matter pending before them should grant all such remedies as appear to be necessary and to which the party would appear entitled in respect of any legal or equitable claim so that the objective is achieved by having the controversy between the parties completely and finally determined.

True I find some of the provisions of the agreement peculiar. Although it is a sale agreement the title of the property remained throughout with the developer. Under Clause 6.02 of P1 the plaintiff (respondent now) would not transfer the title to the appellant until after all payments have been made. Provisions under the miscellaneous part of P1 deal with late payments, interest charges, defaults and vacant possession and forfeiture of all moneys paid. But it is settled law that when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound by the terms. In this case the defendant had signed the agreement knowing fully well that it is a contract for purchase of the house and provisions of the agreement dealt substantially with the modes of payment. It is always implied that the Court has the discretion to add to the reliefs prayed for any relief which in its opinion is fair and just and warranted by the circumstances of the case. It is also clear from the notes as well as from the grounds of decision of the learned President that there was an undertaking by Counsel for the plaintiff then. I do not think I should interfere with an order consequent upon an undertaking made before another Court the terms of which I am not fully familiar with. Furthermore, there is also no cross appeal against this part of the order of the learned President.

The appeal is therefore dismissed with costs and the order of the learned President is affirmed.

Also found at [1982] CLJ 30